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Real Property--Leases--Covenant of Continuing Liability (International Publications, Inc. v. Matchabelli, 260 N.Y. 451 (1933))

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REAL PROPERTY—LEASES—COVENANT OF CONTINUING LIABILITY.—The plaintiff leased certain premises to defendant for five years, at \$2,700 for the first year and \$3,000 a year for the remainder of the term. The lease contained the following clause: "Any entry or re-entry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, and in any manner, shall not be deemed to have absolved or discharged the tenant from any liability hereunder." After thirteen months, the defendant was ejected by summary proceedings for non-payment of rent. For eleven months thereafter, the plaintiff was unable to sublet the premises, for which he asked judgment for \$2,700, with interest. A second cause of action, citing a subletting for the next three years to a third party, asked judgment for \$900, the difference between the rent agreed to be paid by the defendant and the new rent. *Held*, plaintiff was entitled to full judgment under the clause in the lease continuing the liability of the defendant even after removal by summary proceedings. *International Publications, Inc. v. Matchabelli*, 260 N. Y. 451, 184 N. E. 51 (1933).

It has been laid down as a general rule of law that the eviction of a tenant by summary proceedings terminates the relationship of landlord and tenant, so that the former may not recover subsequent installments as rent.¹ Our Civil Practice Act² states that, "The issuing of a warrant for the removal of a tenant from demised premises cancels the agreement for the use of the premises, if any, and annuls accordingly the relation of landlord and tenant, * * *." However, this rule does not militate against the validity of agreements made by landlord and tenant, continuing the liability of the tenant for periods subsequent to such eviction.³ Such a clause has been held not to be contrary to public policy⁴ but simply takes the lease out of the general rule that liability ceases with the end of the tenant's estate.⁵ "The parties may, however, as they did in this case, agree to the contrary and render the lessee liable to the end of the term although out of possession."⁶ Of course, the recovery in each case is to be limited to the actual loss suffered by the landlord through the default of the tenant,⁷ and the landlord is duty bound to make every reasonable effort to re-let

¹ *Cornwell v. Sanford*, 222 N. Y. 248, 118 N. E. 620 (1918); *Hoffman Brewing Co. v. Wuttge*, 234 N. Y. 469, 138 N. E. 411 (1923).

² N. Y. CIVIL PRACTICE ACT, §1434.

³ *Mann v. Munch Brewery*, 225 N. Y. 189, 121 N. E. 746 (1919); *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891 (1st Dept. 1903), *aff'd*, 181 N. Y. 518, 73 N. E. 1119 (1905).

⁴ *Slater v. Von Chorus*, 120 App. Div. 16, 104 N. Y. Supp. 996 (1st Dept. 1907).

⁵ *Mann v. Munch Brewery*, *supra* note 3.

⁶ *Ibid.*, *Crane J.*, at 194, 121 N. E. at 747.

⁷ *Hall v. Gould*, 13 N. Y. 127 (1855); *Hermitage Co. v. Levine*, 248 N. Y. 333, 162 N. E. 97 (1928).

the vacated premises.⁸ In all these cases, although the lease has been terminated, the covenant of continuing liability is held to be distinct from the relationship of landlord and tenant and so survives the annulment of that relationship.⁹ In the instant case, it was immaterial whether the recovery be termed damages¹⁰ or rents, since all payments were past due at the inception of the action.¹¹

M. M.

REAL PROPERTY—PRIVATE WATER COMPANIES—PAYMENT OF PRIOR ACCRUED CHARGES UNENFORCEABLE AGAINST RECEIVER IN FORECLOSURE.—Plaintiff, by virtue of a provision in a mortgage authorizing it, upon default in payment, to collect the rents, procured the appointment of a receiver during the pendency of the foreclosure sale. Prior to the appointment water charges accumulated by the mortgagor were not discharged. A private water company organized pursuant to C. 737 of the Laws of 1873 made application for an order granting it permission to turn off the water unless the mortgagor's bill was paid. *Held*, the company had no lien; and no right to discontinue the water supply for arrears not incurred by the receiver. *Title G. & T. Co. v. 457 Schenectady Ave.*, 260 N. Y. 119, 183 N. E. 198 (1932).

A private water company is under a public duty to furnish water to all consumers who may require it and comply with its reasonable rules.¹ Reasonable regulations include the right to shut off water supplied to *delinquents* and to demand charges for a reasonable time in advance.² Default in payment, however, does not give the company an absolute right to discontinue the supply. Its rights are to be determined by a competent court.³

The supplying of water is a sale.⁴ A private water company does not have a lien by statute⁵ for water charges as is the case

⁸ *Supra* note 4.

⁹ *Roe v. Conway*, 74 N. Y. 201 (1878); *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425 (1902).

¹⁰ See *Hermitage Co. v. Levine*, *supra* note 7, for "damage" clauses and the difficulty encountered there.

¹¹ Instant case, at 454, 184 N. E. at 52.

¹ *City of New York v. Jamaica Water Supply Co.*, 181 App. Div. 49, 167 N. Y. Supp. 763 (2d Dept. 1917), *aff'd*, 226 N. Y. 572, 123 N. E. 859 (1919).

² *Millville Improvement Co. v. Millville Water Co.*, 92 N. J. Eq. 480, 113 Atl. 516 (1921); *supra* note 1.

³ *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785 (1900); *Pond v. New Rochelle Water Co.*, 143 App. Div. 69, 127 N. Y. Supp. 582 (2d Dept. 1911), *aff'd*, 206 N. Y. 719, 100 N. E. 1132 (1912); *supra* note 1.

⁴ *Canavan v. City of Mechanicville*, 229 N. Y. 473, 128 N. E. 882 (1920); N. Y. PERSONAL PROPERTY LAW (1909) §156, subd. 1.

⁵ C. 737 of the Laws of 1873 and amendments. (Courts should not permit water to be turned off. It may be an easy method of collecting debts but a patron who did not purchase the water should not suffer for company's negligence by not demanding charge in advance.)